I.

Basis Upon Which it is Contended that the Supreme Court of the United States Has Jurisdiction Upon Appeal to Review the Judgment in Question.

The judgment of the Supreme Court of Appeals of the State of Virginia, dated and filed on the 16th day of January, 1936, herein, is a final judgment in a suit in the highest court of the State of Virginia in which a decision in the suit could be had, where is drawn in question the validity of a statute of the State of Virginia on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

II.

The Statutory Provision Believed to Sustain the Jurisdiction.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States upon appeal to review the judgment in question is Section 237 of the Judicial Code of the United States, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 937, 28 U. S. C. A. Section 344a, as in effect prior to and at the enactment of the Act of January 31, 1928, Chapter 14, 45 Stat. 54, 28 U. S. C. A., Sections 861a, 861b, and of the amendatory Act of April 26, 1928, Chapter 440, 45 Stat. 466, 28 U. S. C. A., Section 861b, and as amended by and pursuant to the provisions of the said two last mentioned Acts of the year 1928.

III.

The Statute of the State of Virginia, the Validity of Which is Involved.

The statute of the State of Virginia, the validity of which is involved, is an Act of the General Assembly of Virginia approved February 26, 1910, official volume Acts of the General Assembly of Virginia, 1910, Chapter 53, Section 38a, page 79 (Section 207 of the Tax Code of Virginia, Michie's Code of Virginia, 1930), entitled:

> "An Act to Amend and Re-enact Sections 37, 38 and 39 of the Act entitled An Act to raise revenue for the support of the Government and the public free schools and to pay the interest on the public debt * * * with reference to fees on foreign corporations authorized to do business in this State, and to add a section thereto designated as Section 38a."

All of said statute is pertinent to the questions here raised and is as follows:

> "Every foreign corporation, when it obtains from the State Corporation Commission a certificate of authority to do business in this State, shall pay an entrance fee into the treasury of Virginia to be ascertained and fixed as follows:
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> "For a company whose maximum capital stock is fifty thousand dollars, or less, thirty dollars;
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> "For a company whose capital stock is over fifty thousand dollars, and not to exceed one million dollars, sixty cents for each one thousand dollars or fraction thereof;
>
> "Over one million dollars, and not to exceed ten million dollars, one thousand dollars;
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> "Over ten million dollars, and not to exceed twenty million dollars, one thousand, two hundred and fifty dollars;

"Over twenty million dollars, and not to exceed thirty million dollars, one thousand, five hundred dollars;

"Over thirty million dollars, and not to exceed forty million dollars, one thousand, seven hundred and fifty dollars;

"Over forty million dollars, and not to exceed fifty million dollars, two thousand dollars;

"Over fifty million dollars, and not to exceed sixty million dollars, two thousand, two hundred and fifty dollars;

"Over sixty million dollars, and not to exceed seventy million dollars, two thousand, five hundred dollars;

"Over seventy million dollars, and not to exceed eighty million dollars, two thousand, seven hundred and fifty dollars;

"Over eighty million dollars, and not to exceed ninety million dollars, three thousand dollars;

"Over ninety million dollars, five thousand dollars.

"But foreign corporations without capital stock shall pay fifty dollars only for such certificate of authority to do business in this State.

"For the purpose of this section the amount to which the company is authorized by the terms of its charter to increase its capital stock shall be considered its maximum capital stock."

IV.

Date of Judgment Sought to be Reviewed and of Application for Appeal.

The judgment of the Supreme Court of Appeals of Virginia sought to be reviewed was dated, filed and entered on the 16th day of January, 1936.

The application for appeal was presented on the 31st day of March, 1936.

V.

Nature of the Case and Rulings of the Court Bring the Case Within the Jurisdictional Provision Relied On.

Appellant, a Pennsylvania corporation, engaged in the marketing of gasoline and petroleum products in forty-seven States and several foreign countries, sought in 1930 to procure a certificate of authority to do a local business in the State of Virginia in conjunction with the interstate business it had theretofore conducted in that State for many years. Since 1924 Appellant, through the medium of subsidiary corporations, had also engaged continuously in intrastate business in the State of Virginia, and it was this intrastate business being conducted by its subsidiaries which Appellant desired to take over and operate in its own name.

Before being issued a certificate of authority under date of January 22, 1930, Appellant was required to pay, as a charge for the privilege of doing a local business in Virginia, the $5,000 entrance fee prescribed by said Act of the General Assembly of Virginia, approved February 26, 1910. (Said Act, the invalidity of which is asserted on this appeal, will hereinafter sometimes be designated as "Section 207".) *The amount of this charge was determined, pursuant to the provisions of Section 207, solely by the amount of Appellant's total authorized capital stock.* It was not based upon or related to the amount of capital employed or proposed to be employed by Appellant within the State of Virginia, nor did it have any relation to the value of the privilege or franchise to be exercised by the Appellant within the State of Virginia, or to the amount of business proposed to be done or property owned or proposed to be acquired and used by Appellant in that State.

The total number of shares of capital stock of the Appellant authorized and which might be issued, as of January 22, 1930, was 4,000,000 shares, all of which was common stock of the par value of $25 per share, making a total authorized capitalization of $100,000,000. Of this authorized capital there was issued and outstanding on said date only 2,681,980 shares, having a par value of $67,049,500. At the same time, the total invested capital of the Appellant amounted to $132,196,275 and during the calendar year 1929 its total volume of business aggregated $153,520,041, of which a most substantial part was interstate in character. *Of such total invested capital, only $262,580, or approximately one-fifth of one per cent thereof, was invested in Virginia on said date.* The volume of business done in said State during the calendar year 1929, including both its interstate and the intrastate business of its subsidiaries, amounted to $1,396,600, or only nine-tenths of one per cent of Appellant's total business for that year. Approximately two-thirds of the business done in Virginia was intrastate, and one-third thereof interstate.

On April 26, 1930, under and pursuant to the provision of Section 408 of the Tax Code of Virginia, as amended,[1] Appellant filed its petition with the State Corporation Commission of Virginia, asserting therein that Section 207 was unconstitutional and void and claiming a refund of said sum of $5,000 theretofore exacted from it, under protest. The sole grounds relied upon in said petition for a refund were stated therein as follows:

> "(1) The Act, Section 207, of the Tax Code of Virginia, under which said entrance fee is imposed in effect has deprived petitioner of its property without

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[1] Acts of the General Assembly of Virginia, 1930, p. 917; Section 408 of the Tax Code of Virginia, Michie's Code, 1930.

due process of law, in violation of the provisions of the 14th Amendment of the Constitution of the United States, and of Section 2, Article I of the Constitution of the State of Virginia.

"(2) The enforcement of the aforesaid statutes, as applied in this case, denies petitioner the equal protection of law in violation of the 14th Amendment of the Constitution of the United States.

"(3) The enforcement of the aforesaid statutes constitutes an interference with commerce among the several States, the right to regulate which is by Clause 3, Section 8, Article I of the Constitution of the United States conferred upon the Congress of the United States, and, payment of said fee being required as a condition precedent to permitting petitioner to do any business in the State of Virginia, constitutes a burden upon interstate commerce.

"(4) Said entrance fee is based on the total authorized capital stock of petitioner, without any reference to the amount of stock issued and outstanding, or the actual or market value of said stock, or of the location in the State of Virginia and elsewhere of the property of petitioner, or to the amount of business of petitioner in the State of Virginia or elsewhere, and without reference to any reasonable or logical basis, said amount being wholly arbitrary, excessive and unreasonable and oppressive." (Printed Record before the Supreme Court of Appeals of Virginia, page 18).

It thus appears that the Federal questions sought to be reviewed on this appeal were clearly and explicitly raised at the very outset of this case. The alleged invalidity of Section 207 under the Constitution of the United States, for the reasons stated, constituted the sole basis for the claim for a refund.

No formal pleadings were filed by the Commonwealth of Virginia, but it was represented before the Corporation Commission of the State of Virginia by the Attorney Gen-

eral of that State in accordance with the provisions of the statute under which said petition for a refund was filed. After two hearings, and following the taking of the case under advisement for more than a year, after the second hearing, the State Corporation Commission entered a final order on November 14, 1934, denying and dismissing said petition for a refund. At the same time the Commission handed down an opinion, 147 printed pages long, in which it held that Section 207 of the Tax Code was constitutional, and that the imposition thereunder of the $5,000 tax upon Appellant did not deprive it of either the due process of law or the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States, and furthermore, that said imposition did not infringe the commerce clause of said Constitution.

An appeal from said final order of the State Corporation Commission to the Supreme Court of Appeals of Virginia was awarded Appellant by that court on May 8, 1935. The three principal assignment of errors relied upon were that the Commission had erred in failing to hold that the statute in question, as applied to Appellant, denied it due process and equal protection of the laws as aforesaid, and infringed the commerce clause of the Constitution of the United States. Thus again the three Federal questions sought to be reviewed on this appeal were squarely and explicitly raised in the Supreme Court of Appeals of Virginia by Appellant's assignment of errors to the action of the State Corporation Commission.[2] Each of these assignments of errors was relied upon by Appellant before the Supreme Court of Appeals of Virginia, both in its briefs and in oral

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[2] For the full statement of the assignment of errors taken by Appellant in the Supreme Court of Appeals of Virginia to the action of the State Corporation Commission, see printed record before the Supreme Court of Appeals of Virginia, pp. 8 and 9.

argument. That court, in its opinion and final judgment rendered and entered on January 16, 1936, and here appealed from, affirmed the judgment of the State Corporation Commission and expressly sustained the validity of Section 207 of the Tax Code, and of the imposition made thereunder upon the Appellant.[3]

It appears, therefore, that under and by virtue of said Section 207 of the Tax Code of Virginia, the Appellant, a Pennsylvania corporation, has been compelled to pay to the State of Virginia an entrance fee of $5,000 for the privilege of doing an intrastate business in that State; that the amount of such imposition was determined, in accordance with the provisions of said Section 207, solely by the amount of Appellant's authorized capital stock, without regard to the amount of its capital employed, or proposed to be employed, within the State of Virginia, without regard to the business done or proposed to be done within that State, and wholly without regard to the value of the privilege or franchise to be exercised by the Appellant within said State of Virginia; that Appellant's capital stock represented its property located in forty-seven States and several foreign countries, as well as its entire business, both interstate and intrastate; that Appellant therefore contended, before the State Corporation Commission first and finally before the Supreme Court of Appeals of Virginia, that the imposition of the fee prescribed by said statute deprived it of its property without due process, since the amount of such fee was measured and determined by property beyond the taxing jurisdiction of the State of Virginia, denied it equal protection of the laws because it operated arbitrarily and un-

[3] Pursuant to the provisions of the Rules of this Court, Rule 12, Paragraph 1, Appellant appends hereto, marked "Appendix A", a copy of the opinion rendered below in this case by the Supreme Court of Appeals of Virginia.

equally as between foreign corporations seeking the same privilege within the State of Virginia, and unlawfully burdened its interstate commerce because the amount thereof was measured and determined by Appellant's total capital, representing its interstate, as well as its intrastate, business, all in contravention of the Constitution of the United States; and that the State Corporation Commission and finally the Supreme Court of Appeals of Virginia rejected the aforesaid contentions made by Appellant and squarely decided in favor of the validity of said statute.

Under such circumstances the only remedy remaining to Appellant is this appeal to the Supreme Court of the United States, and it is respectfully submitted that the nature of the case and the rulings of the Supreme Court of Appeals of Virginia, all as aforesaid, are such as to bring this case squarely within the jurisdictional provision relied on herein.

VI.

Grounds Upon Which it is Contended the Questions Involved are Substantial.

First. In holding that Section 207, as applied to Appellant, was not repugnant to the Constitution of the United States, the Supreme Court of Appeals of Virginia relied principally upon the decision in *General Railway Signal Company* v. *Virginia,* 246 U. S. 500. That case, decided in 1918, sustained the validity of this same section of the Virginia Tax Code (then designated as Section 38a, Chapter 53, Acts of the General Assembly of Virginia, 1910), holding that the fee imposed upon the General Railway Signal Company for the privilege of doing business in Virginia did not constitute an unlawful burden upon interstate commerce. *Whether such statute violated the Fourteenth Amendment was not before the court, since the Signal Company had made no claim, at any stage in the proceed-*

ings, that it had been deprived of its property without due process, or that it had been denied equal protection of the laws. The entire opinion of this Court on the validity of the statute in question follows:

> "It is further insisted that as the amount of prescribed entrance fee is based upon maximum capital stock it constitutes a burden on interstate commerce, contrary to the Federal Constitution.
>
> "Section 38a, c. 53, Acts of Virginia, 1910 (copied in margin) requires every foreign corporation with capital over one million and not exceeding ten million dollars when it obtains a certificate of authority to do local business to pay a fee of one thousand dollars. Inspection of the statute shows that the prescribed fees do not vary in direct proportion to capital stock and that a maximum is fixed. In the class to which plaintiff in error belongs the amount specified is one thousand dollars and, under all the circumstances, we cannot say this is wholly arbitrary or unreasonable.
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> "Considering what we said in *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350; *Kansas City, Fort Scott & Memphis Ry. Co.* v. *Kansas*, 240 U. S. 227; *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles*, 242 U. S. 111, the two characteristics of the statute just referred to must be regarded as sufficient to save its validity. It seems proper, however, to add that the case is on the border line. See *Looney* v. *Crane Co.*, 245 U. S. 178; *International Paper Co.* v. *Massachusetts, ante*, 135, and *Locomobile Co.* v. *Massachusetts, ante*, 146."

It will be observed from the foregoing that the provision in the Virginia statute for a maximum limit, and the fact that the fee prescribed by it did not vary in direct proportion to the authorized capital stock, were regarded as *"two characteristics • • • sufficient to save its validity". Yet even their presence did not keep the case from being on the "border line".*

Although *General Railway Signal Company* v. *Virginia, supra,* has not been expressly overruled,[4] Appellant contended before the State Corporation Commission and the Supreme Court of Appeals of Virginia, and now urges on this appeal that the subsequent decisions of this Court in *Air-Way Electric Appliance Corporation* v. *Day,* 266 U. S. 71; *Alpha Portland Cement Company* v. *Massachusetts,* 268 U. S. 203, and *Cudahy Packing Company* v. *Hinkle,* 278 U. S. 460, compel the conclusion that Section 207 is invalid today, and as applied to Appellant. Particular reliance is placed on *Cudahy Packing Company* v. *Hinkle, supra,* which is believed by Appellant to be determinative of the due process and commerce clause questions in the instant case.

The *Cudahy Packing Company* case, decided in 1929, held invalid the annual "license fee" and the single "filing fee" imposed by the State of Washington upon foreign corporations for the privilege of doing a local business in that State. The statutes in question were enacted in 1925, several years after the Cudahy Packing Company had first begun its intrastate business in Washington. Like the Virginia fee here in question, both of these Washington impositions were measured by total authorized capital stock, and neither of them varied directly with the amount thereof. Furthermore, the Washington statutes both contained maximum limits of $3,000 each, identical in principle

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[4] Nor has it ever been cited or followed by the United States Supreme Court on the constitutional question here in issue. The Supreme Court of Appeals of Virginia, in the opinion hereby appealed from, erroneously states that the *General Railway Signal Company* Case was followed on the question here in issue in *Western Gas Construction Co.* v. *Virginia,* 276 U. S. 597. The only question presented to this Court, or in any way involved in that case, was whether the Construction Company was doing an intrastate business within Virginia.

to the $5,000 maximum limit prescribed by the Virginia statute.

The Cudahy Packing Company was a Maine corporation and, also like the appellant herein, had only a very small percentage of its total business in Washington. In 1927, that Company increased its authorized capital stock and thereby became liable for the "filing fee", which was a single fee imposed at the time of entrance into the State, and at such times thereafter as the corporation in question increased its authorized capital stock.[5] An injunction against the imposition of such fee was sought, the Packing Company asserting its invalidity upon identically the same grounds now being invoked by appellant herein. Following *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68,[6] a statutory three judge court upheld the validity of the Washington statutes in question. *Cudahy Packing Co.* v. *Hinkle*, 24 F. (2d) 124.

Upon appeal to this Court such holding was reversed, and the Washington filing fee, as well as its annual license fee, was held invalid. *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460. Since this filing fee was measured by total

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[5] This scheme is precisely paralleled by that in Virginia. Section 207 prescribes the fee charged at the time of entrance and Section 208 of the Tax Code of Virginia (Acts of the General Assembly of Virginia, 1906, p. 573, as amended in 1910, page 77, and as amended in 1926, p. 903) prescribes an additional fee after entrance whenever the foreign corporation increases its authorized capital stock. The schedule of fees contained in Section 207 determines the amount of the entrance fee as well as the amount of the subsequent fee following an increase in authorized capital.

[6] *General Railway Signal Co.* v. *Virginia, supra*, was also relied upon by the State of Washington, and was cited in the opinion of the District Court.

authorized capital stock, it was in legal effect a tax upon the Packing Company's entire business, including that which was interstate, and on its entire property, including that in other States.[7] Therefore, under a long line of decisions by this Court,[8] such fee was clearly unconstitutional *unless saved by the presence of the $3000 maximum limit.* As Mr. Justice McReynolds said:

> "Unless saved by the $3000 limitation, the Washington enactments are subject to the constitutional objections pointed out in Looney v. Crane Company, and must be denied effect."

This Court then proceeded to hold that the doctrine of *Baltic Mining Company* v. *Massachusetts, supra* (to the effect that a reasonable maximum limit saved a fee imposed upon foreign corporations measured by total authorized capital stock), was now "definitely disapproved", and that therefore the maximum limit did not save the Washington filing fee. Although the majority opinion in the *Cudahy Packing Company* case did not refer to *General Railway Signal Co.* v. *Virginia, supra,* Mr. Justice Brandeis pointed out in his dissenting opinion that the Washington filing fee held invalid was identical in principle to the entrance fee sustained in the *General Railway Signal Company* case. Appellant herein concurs in the view that the two impositions are identical in principle, and submits, therefore, that *Cudahy Packing Company* v. *Hinkle, supra,* requires that Section 207 of the Virginia Tax Code, as applied to appellant in this case, be held invalid.

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[7] *International Paper Co.* v. *Massachusetts,* 246 U. S. 135.

[8] *Western Union Tel. Co. v. Kansas,* 216 U. S. 1; *Pullman Co.* v. *Kansas,* 216 U. S. 56; *Ludwig* v. *Western Union Telegraph Co.,* 216 U. S. 146; *Looney* v. *Crane Co.,* 245 U. S. 178; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135; *Locomobile Company* v. *Massachusetts,* 246 U. S. 146.

The Supreme Court of Appeals of Virginia, in the decision which is the subject of this appeal, frankly recognized that the Washington "filing fee" held unconstitutional in the *Cudahy Packing Company* case was "in principle quite like Virginia's entrance fee". However, the Virginia court avoided the force and effect of that decision by drawing a distinction between an imposition imposed upon a foreign corporation at the time of entrance into the State, and one imposed thereafter upon an increase in its authorized capital stock, even though both impositions be imposed for the same privilege.[9] The Virginia court said:

> "An entrance fee is to be distinguished from charges thereafter made."[10]

Thus the decision which appellant is asking this Court to review holds that a fee for the privilege of doing a local business may be measured by the total authorized capital stock of the foreign corporation if imposed at the time of

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[9] The Attorney General of Virginia, in the brief filed in this case before the Supreme Court of Appeals of Virginia, took substantially the same view. He recognized that *Cudahy Packing Company* v. *Hinkle, supra,* was controlling, unless the State had a greater power to tax at the time of entrance than it did thereafter, even though in each instance the privilege taxed was the right to do a local business.

[10] This basis for sustaining Section 207, it will be noted, is entirely different from that relied on by the Supreme Court of Appeals and by this Court in sustaining this same statute in the *General Railway Signal Company* case. In that case, as has been pointed out, the presence of a maximum limit, plus the fact that the fee did not vary in direct proportion to the capital stock, was said to save its validity. The since repudiated *Baltic Mining Company* case, which had established this "maximum limit doctrine", was the authority followed.

entrance, but may not be so measured at any time thereafter.[11]

This is a unique reversion to an early misconception of the doctrine of the *Bank of Augusta* v. *Earle*, 13 Peter 519, and *Paul* v. *Virginia*, 8 Wall. 168. Although paying some lip-service to the doctrine of unconstitutional conditions at one place in its opinion, *the Virginia court has actually applied the now wholly repudiated view that the power to exclude a foreign corporation includes the power to impose any kind or character of condition upon its entrance.*

It is respectfully submitted that in so holding that a fee is valid if imposed upon entrance and that the same fee is invalid if imposed thereafter, the Virginia Court of Appeals has not only done violence to the doctrine of unconstitutional conditions, but also has thereby ignored the controlling decisions of this Court establishing that a condition may not be imposed upon entrance which would be invalid if imposed thereafter. See particularly:

Southern Pacific Co. v. *Denton*, 146 U. S. 202;
Terral v. *Burk Construction Co.*, 257 U. S. 529;
Frost Trucking Co. v. *Railroad Commission*, 271 U. S. 583;
Hanover Fire Insurance Co. v. *Harding*, 272 U. S. 494.

The doctrine of the foregoing cases has been adopted and succinctly stated by the authoritative *Restatement of the Law of Conflicts of Laws.*[12]

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[11] Under the decision of the Supreme Court of Appeals of Virginia, it will be noted that Section 207 is valid as to corporations seeking to enter the State of Virginia, but is invalid as to foreign corporations already doing an intrastate business but which increased their authorized capital stock.

[12] Adopted and promulgated as the final draft on May 11, 1934, by the American Law Institute. For a scholarly dis-

"A state of the United States cannot compel a foreign corporation, as a condition of doing or continuing to do business in the state, to relinquish rights secured by the Constitution of the United States (Section 170).

* * * * * * *

"Under the Constitution of the United States, a state cannot make a condition of a foreign corporation's doing business in the state the payment of a tax which it could not constitutionally impose if the corporation had already been permitted to do business in the state" (Section 176). (Italics supplied.)

This holding of the Virginia Court is also squarely contrary to several excellent decisions by the highest courts in other States actually involving attempted impositions of fees measured by total authorized capital stock as a condition upon entering such States for the first time. *Perkins Manufacturing Co.* v. *Jordan,* 200 Calif. 667, 254 N. W. 551; *Badger* v. *Crockett,* 70 Utah 265, 259 Pac. 921; *Chicago, etc. Ry.* v. *Harman,* 89 Mont. 1, 295 Pac. 762; and see also *State* v. *Liggett & Myers Tobacco Co.,* 171 S. C. 511, 172 S. E. 857.[13]

Second. In showing that substantial Federal questions are involved in this appeal, we have heretofore undertaken

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cussion of the doctrine of unconstitutional conditions, concurring entirely with the views of the Appellant herein, see Henderson, the Position of Foreign Corporations in American Constitutional Law (1918), Chapter 8, pp. 134-143.

[13] These decisions were simply ignored by the Supreme Court of Appeals of Virginia with the terse remark that: "We have not undertaken to review the cloud of cases brought to our attention. They beat down the mind and cloud with dust the vision."

to demonstrate that the decision appealed from is contrary to the latest ruling by this Court on the subject, *Cudahy Packing Company* v. *Hinkle, supra,* and that the Supreme Court of Appeals of Virginia, in its effort to distinguish the *Cudahy Packing Company* case from the instant one, has undertaken to revitalize an interpretation of *Bank of Augusta* v. *Earle* and *Paul* v. *Virginia* which is now thoroughly discredited by subsequent decisions of this Court. Only the questions of burdening interstate commerce and taking property without due process were passed upon in *Cudahy Packing Company* v. *Hinkle, supra;* hence that decision, and the Virginia Court's treatment thereof, has no bearing upon Appellant's further contention that Section 207 denies it equal protection of the laws, which contention we shall now consider as presenting an additional Federal question of substance.

The authority principally relied upon in support of the alleged denial of equal protection of the laws is *Air-Way Electric Appliance Corporation* v. *Day, supra.* That case, decided six years after *General Railway Signal Company* v. *Virginia, supra,* held that the imposition of an annual license fee upon foreign corporations for the privilege of doing a local business is invalid as a denial of equal protection of the laws *where such fee is measured by total authorized capital stock.*

Although the Supreme Court of Appeals of Virginia did not deign to allude to the *Air-Way Electric Appliance Corporation* decision, the State Corporation Commission recognized in its opinion that inequality and discrimination inevitably exists where a fee, imposed upon foreign corporations for the privilege of doing a local business, is measured by total authorized capital stock.[14] However, the ef-

[14] As was said by this Court in the *Air-Way Electric Appliance Corporation* case, the mere number of authorized

fect of this admitted inequality was sought to be avoided by the State Corporation Commission upon the theory that a State owes foreign corporations seeking permission to do a local business no duty of equal protection of the laws. Thus the question presented is narrowed down to whether a State may impose an admittedly unequal and discriminatory entrance fee upon foreign corporations as a condition to their doing business in the State. The opinion of the Corporation Commission below answers this question affirmatively, holding that such corporations are not within the State's jurisdiction, and hence as between each other are not entitled to equal treatment upon entrance.

So far as we have been able to ascertain the question so presented has never been decided by this Honorable Court. *Air-Way Electric Appliance Corporation* v. *Day, supra,* although strongly persuasive, is not squarely in point, because there the foreign corporation in question had already been admitted to the State, and this Court has definitely decided that once admitted a foreign corporation is entitled to equal treatment not only with respect to other foreign corporations but also with respect to domestic corporations. *Southern Railway Co.* v. *Green,* 216 U. S. 400; *Hanover Fire Insurance Co.* v. *Harding,* 272 U. S. 494. This Court has also held that foreign corporations not yet admitted are not entitled to equal treatment *with domestic corporations.* See *Hanover Fire Insurance Co.* v. *Harding, supra. Thus the question left open, and presented for the first time by this appeal, is whether foreign corporations seeking admission are entitled to rely upon the equal protection clause of the Fourteenth Amendment to prevent the imposition of arbitrary and unequal conditions.*

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shares "is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of * * * annual fees."

The only authorities which have been found bearing upon this question clearly support Appellant's view that although the State may exclude entirely it may not impose as a condition upon entrance a fee or tax which would amount to a denial of equal protection if the corporation were already within the State. *Perkins Manufacturing Co.* v. *Jordan, supra; American Law Institute, Restatement of the Law of Conflict of Laws,* Section 176; *Henderson, op. cit., supra,* Chapter 9, p. 160 *et seq.*; and *Colvert and Pyke, Taxation of Foreign Corporations,* 5 Cincinnati Law Review 54.[15]

Summary as to substantial Federal questions. It appears from the foregoing: (1) That the Supreme Court of Appeals of Virginia, in refusing to hold that Section 207 unlawfully burdened interstate commerce and operated to take Appellant's property without due process, has decided a Federal question of substance in a way probably not in accord with the applicable decisions of this Court; (2) that the said court, in refusing to hold that Section 207 violated the equal protection clause of the Fourteenth Amendment has also decided a Federal question of substance not heretofore determined by this Court; and (3) that the decision of said court, in sustaining the validity of Section 207, is squarely opposed to and in conflict with several recent decisions by the highest courts in other States.

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[15] See also: *O'Gara Coal Co.* v. *Emerson,* 326 Ill. 18, 156 N. E. 814 (1927); *Montgomery-Ward & Co.* v. *Becker,* 69 S. W. (2d) 674, 334 Mo. 789; *Great Northern Ry. Co.* v. *State,* 147 Wash. 630, 267 Pac. 506; *State ex rel. Borden Co.* v. *Dammann,* 198 Wisc. 265, 224 N. W. 139.

VII.

Cases Believed to Sustain Jurisdiction.

In support of its contentions that Section 207 operates as an unlawful burden upon interstate commerce and deprives it of property without due process of law, Appellant relies upon the following cases, *inter alia*:

Cudahy Packing Co. v. *Hinkle,* 278 U. S. 460;
Alpha Portland Cement Co. v. *Massachusetts,* 268 U. S. 203;
Locomobile Co. v. *Massachusetts,* 246 U. S. 146;
International Paper Co. v. *Massachusetts,* 246 U. S. 135;
Looney v. *Crane Co.,* 245 U. S. 178;
Ludwig v. *Western Union Tel. Co.,* 216 U. S. 146;
Pullman Co. v. *Kansas,* 216 U. S. 56;
Western Union Tel. Co. v. *Kansas,* 216 U. S. 1;
Perkins Mfg. Co. v. *Jordon,* 200 Calif. 667;
Badger v. *Crockett,* 70 Utah 265, 259 Pac. 921;
Minneapolis Steel & Machinery Co. v. *Crockett,* 263 Pac. 926, 71 Utah 211;
Chicago, etc. Ry. v. *Harman,* 295 Pac. 762, 89 Mont. 1;
State v. *Liggett & Myers Tobacco Co.,* 171 S. C. 511, 172 S. E. 857.

In support of its contention that Section 207 operates to deny it equal protection of the laws, Appellant relies upon the following cases, *inter alia*:

Air-Way Elec. App. Corp. v. *Day,* 266 U. S. 71;
Perkins Mfg. Co. v. *Jordon,* 200 Calif. 667;
O'Gara Coal Co. v. *Emerson,* 326 Ill. 18, 156 N. E. 814;
Montgomery Ward & Co. v. *Becker,* 69 S. W. (2d) 674; 334 Mo. 789.

Great Northern Ry. Co. v. *State,* 147 Wash. 630;
State ex rel. Borden Co. v. *Dammann,* 224 N. W. 139, 198 Wisc. 265;
Cf. *Roberts & Schaffer Co.* v. *Emerson,* 271 U. S. 50.

In support of its right to appeal to this Court, Appellant believes that the following cases sustain the jurisdiction:

Pacific Tel. & Tel. Co. v. *Tax Commissioner of the State of Washington,* 297 U. S. — (decided March 2, 1936);

Matson Navigation Co. v. *Board of Equalization of Calif.,* 297 U. S. — (decided March 2, 1936);

Schuylkill Trust Co. v. *Commonwealth of Pennsylvania,* 296 U. S. —, 80 L. Ed. 15 (Ad. Sh. decided Nov. 11, 1935);

Senior v. *Braden,* 295 U. S. 422, 429;

Aero Mayflower Transit Co. v. *Ga. Public Service Commission,* 295 U. S. 285;

Wiloil Corporation v. *Commonwealth of Penn.,* 294 U. S. 169;

Detroit International Bridge Co. v. *Corporation Tax Appeal Board,* 294 U. S. 83;

Concordia Insurance Co. v. *Ill.,* 292 U. S. 535;

Detroit International Bridge Co. v. *Corporation Tax Appeal Board,* 287 U. S. 295;

Advance-Rumley Thresher Co. v. *Jackson,* 287 U. S. 283;

Safe Deposit & Trust Co. v. *Virginia,* 280 U. S. 83, 89;

Great Northern Ry. v. *Minn.,* 278 U. S. 503;

Nashville, C. & St. L. Ry. v. *White,* 278 U. S. 456;

Louisville & Nashville Ry. Co. v. *Melton,* 218 U. S. 36, 49.

It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal by virtue of said Section 237 of the Judicial Code, 28 U. S. C. A., Section 344a, as amended.

Respectfully submitted,

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"APPENDIX A."

IN THE SUPREME COURT OF APPEALS OF VIRGINIA.

THE ATLANTIC REFINING COMPANY,

v.

COMMONWEALTH OF VIRGINIA.

From the State Corporation Commission of Virginia.

Richmond, Va., January 16, 1936.

OPINION BY JUSTICE HENRY W. HOLT.

The petitioner, a non-resident commercial corporation, has been assessed with an entrance fee as a condition precedent to the privilege of doing domestic business in Virginia. This entrance fee is paid under protest and claims that the statute imposing it is unconstitutional. In proper proceedings relief was sought before the State Corporation Commission and refused. Hence, this appeal.

In the opinion of the Corporation Commission is a full and satisfactory statement of facts, which we might with confidence adopt as written, but for brevity we shall restate those matters which in our judgment are of major importance and upon which this case turns.

Necessarily, we look to conditions as they were when this fee was paid. If it was then a proper charge it is not invalidated by subsequent proceedings, nor can such proceedings make good that which was once void.

Indeed if this entrance fee had not been paid at the time of entry it might never be paid. Insolvency might intervene. The petitioner might complete its work and withdraw before an assessment or levy could be made.

The Atlantic Refining Company is a Pennsylvania corporation and was chartered there in 1870. It refines petroleum and sells its products in forty-seven states, and in fourteen of them, Virginia now included, it maintains local stations

for the sale of its own products and of automobile accessories.

On January 7, 1930, petitioner gave notice to the Commission of its intention to do a general business in Virginia without first paying any entrance fee, suggesting, however, that it be permitted to pay this fee under protest. On January 13, 1930, the Commission replied that the company was at liberty to adopt its own procedure, but that domestic business done in Virginia without payment of an entrance fee would be at its peril. Payment was made under protest on January 17, 1930, and on January 22, 1930, the desired permit issued.

This litigation was properly begun on April 26, 1930, by petition addressed to the State Corporation Commission. It concludes with this prayer:

> "Wherefore, your petitioner prays that this Honorable Body may certify to the Comptroller of the State of Virginia that petitioner has paid into the State treasury an amount in excess of that required by law, to-wit: $5,000 on account of the entrance fee paid by the petitioner upon the granting of the certificate of authority to do business in the State of Virginia, and that the amount so paid may be refunded to petitioner, and that it may have all such other relief as to which it may be entitled."

Relief was refused.

Previous to the permit of January 22, 1930, this oil company had directly and indirectly for six years or more done an interstate business in Virginia. This the State did not undertake to hamper. It was not seeking permission to do something which it was already doing but permission to do something in addition, namely, to do directly and in its own name an intrastate business.

Mr. Serven, Assistant Comptroller in charge of domestic marketing, was asked and replied:

> "Q. In other words, the primary purpose in handling gas and oil products in Virginia is to supply what we might call the local Virginia business?
>
> "A. That is correct."

Before January 22, 1930, this Pennsylvania corporation had done directly an interstate business in its own name. It had done through the Red "C" Oil Company, a subsidiary Maryland corporation, which included the business of the Richmond Oil Company, an interstate and intrastate business, and it had done through the Atlantic Refining Company, a New York corporation, an intra-state business. Its volume in 1929 was:

"(1) Interstate business done by petitioner in its own name	$363,534
"(2) Business done by Red "C" Oil Company, both interstate and intra-state, but principally intra-state	$866,600
"(3) Business of Atlantic Refining Company, Inc., exclusively intra-state	$166,466
"Total	$1,396,600"

This is its statement of its business on January 1, 1930:

> "The only business in which petitioner was interested in the State of Virginia was the business, interstate and intrastate, of the Red "C" Oil Company and the interstate business conducted by petitioner in its own name; and the only property in Virginia in which petitioner was interested was the above described property belonging to Red "C" Oil Company having a value of approximately $262,580."

As of January 22, 1930, the total authorized capital of petitioner was $100,000,000. And there was outstanding shares having a par value of $67,049,500. As of January 1, 1930, its total invested capital was $132,196,275, and the volume of its business in 1929 was $153,530,041.

This is the statute in controversy, Sec. 207 of the Tax Code of Virginia:

> "Every foreign corporation, when it obtains from the State Corporation Commission a certificate of

authority to do business in this State, shall pay an entrance fee into the treasury of Virginia to be ascertained and fixed as follows:

"For a company whose maximum capital stock is fifty thousand dollars or less, thirty dollars;

"For a company whose capital stock is over fifty thousand dollars and not to exceed one million dollars, sixty cents for each one thousand dollars or fraction thereof;

"Over one million dollars, and not to exceed ten million dollars, one thousand dollars;

"Over ten million dollars, and not to exceed twenty million dollars, one thousand, two hundred and fifty dollars;

"Over twenty million dollars, and not to exceed thirty million dollars, one thousand, five hundred dollars;

"Over thirty million dollars, and not to exceed forty million dollars, one thousand, seven hundred and fifty dollars;

"Over forty million dollars, and not to exceed fifty million dollars, two thousand dollars;

"Over fifty million dollars, and not to exceed sixty million dollars, two thousand, two hundred and fifty dollars;

"Over sixty million dollars, and not to exceed seventy million dollars, two thousand, five hundred dollars;

"Over seventy million dollars, and not to exceed eighty million dollars, two thousand, seven hundred and fifty dollars;

"Over eighty million dollars, and not to exceed ninety million dollars, three thousand dollars;

"Over ninety million dollars, five thousand dollars.

"But foreign corporations without capital stock shall pay fifty dollars only for such cerificate of authority to do business in this State.

"For the purpose of this section the amount to which the company is authorized by the terms of its charter

to increase its capital stock shall be considered its maximum capital stock" (Tax Bill, sec. 38a; 1910, p. 77).

This system of taxation has been in force in Virginia for more than thirty years. It has been twice assailed and twice sustained. *General Railway Signal Co.* v. *Commonwealth*, 118 Va. 301; affirmed, 246 U. S. 500; and *Western Gas Construction Co.* v. *Virginia*, 147 Va. 225; affirmed, 276 U. S. 597 (Mem.).

Charter fees for domestic corporations are assessed in substantially the same way, Tax Code, sec. 206, smaller it is true than those charged foreign corporations for doing a domestic business. As might be expected, the state favors its own instrumentalities.

> "In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the state for the license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but after its admission the foreign corporation stands equal, and is to be classified with domestic corporations of the same kind." *Hanover Fire Insurance Co.* v. *Carr*, 272 U. S. 494.

After admission every foreign corporation and every domestic corporation, so far as taxes are concerned, stand upon a common footing, Tax Code, sec. 210.

It is conceded that some charge in the nature of an entrance fee may be imposed. If this were not true domestic business would ultimately drift to foreign corporations. Why pay charter fees when they may be in this manner evaded?

If these fees are to be fixed by business thereafter done nothing may be collected. The corporation may become insolvent. It may finish its work and go. Doubtless these considerations influence the policy of the state, and it is not affected by the fact that other states may have followed different policies. Such considerations address themselves to the Legislature. Moreover, some classification is reasonable. It can not be contended that the power to assess an income tax makes it necessary to assess all incomes ratably.

If all the paid-in capital of a corporation was engaged in interstate business, any assessment against that capital would be a charge on interstate commerce, and for a stronger reason that objection could be urged against an assessment levied against the volume of its business.

In the instant case this tax is not even levied against authorized capital. The tax against the Standard Oil Company of New Jersey, whose capital exceeds many times that of petitioner, is but $5,000. The authorized capital is not taxed but is used as a measure for taxation.

A state may arbitrarily refuse entrance to a foreign corporation, although it can not, as a condition for admission, impinge upon rights guaranteed by the federal constitution. *International Paper Co.* v. *Massachusetts,* 246 U. S. 135. *Hanover Fire Insurance Co.* v. *Carr, supra.*

> "The power of the state to impose upon a foreign corporation a license fee or tax as a condition precedent to its entry into the state is, from its nature, less subject to constitutional limitations than the power to impose a franchise tax as payment or compensation for the privilege of continuing to do business here." *People* v. *Loughman,* 249 N. Y. 369, 164 N. E. 253. Mr. Justice Cardozo was then a member of that court.

When a corporation has come into a state with its permission, has made investments and has built up a business, it has given hostages to fortune and can not then be told that it must submit to oppressive legislation or go.

Although it is not of major moment, we think the Commission was justified in finding that this corporation after it came could have no real difficulty in keeping separate accounts of its interstate and intra-state business.

If our statute imposes any direct burden upon interstate commerce, however small, it must fail, but it must in some form be a tax on property and not on privilege.

> "It is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights. * * * The turning point of these decisions is whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon, it, or whether it affects it only incidentally or remotely, so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it." *Hump Hairpin Mfg. Co.* v. *Emmerson,* 258 U. S. 290.

We have seen that it was sustained in *General Railway Signal Co.* v. *Virginia.* That case was argued on March 11, 1918, decided April 15, 1918, and is reported in 246 U. S. 500. It again came under review in *Western Gas Construction Co.* v. *Virginia,* 276 U. S. 597, and was again sustained in a memorandum decision on authority of the *General Railway Signal Co. case.* This was at the October Term, 1927.

If these decisions have not been overruled, our investigation is at an end, and if overruled, it must be by something since done. Certainly the court when they were handed down did not think that they were in conflict with principles previously approved.

It is not contended that this has been directly done, but it is contended that it has been done indirectly and by neces-

sary inference. It is said that they follow *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, and that the principles there relied upon have since by that court been definitely disavowed. In support of this *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460, is in major measure relied upon.

In considering this claim these principles are to be remembered. Repeal by implication is not favored and statutes are not likely held to be unconstitutional.

In 1916 the Cudahy Packing Company, a Maine corporation, went into the State of Washington, and has since conducted there a "closely associated interstate and intra-state business". This entry was in all respects regular and met every statutory requirement. Its capital stock was then $20,000,000. By 1926 its authorization was increased to $45,000,000. It had acquired property worth $40,000, and its gross sales were $1,313,275. Less than one-half of it was intra-state. In 1925 that State by statute provided for a "filing fee", in principle quite like Virginia's "entrance fee". Its maximum limit was $3,000. An annual license fee with a $3,000 limitation was also imposed.

It was held that these charges were direct burdens upon interstate commerce and invalid.

The court said that unless saved by the $3,000 limitation the Constitutional objections pointed out in *Looney* v. *Crane Co.,* 245 U. S. 178, were in point and should be applied. It, therefore, becomes necessary to see what were the facts and to see what was done in this Texas case.

The Looney case was first argued on May 3, 1916. It was re-argued on November 6, 1917, and decided on December 10, 1917.

This, as we have seen, was but a short time before the *General Railway Signal Company* case had been argued, and decided.

In *Looney* v. *Crane Co., supra,* these facts appear: The Crane Company was an Illinois corporation. In 1905 it filed with the Secretary of State for Texas its articles of incorporation, paid a decennial tax for the privilege of doing business there, and continued to pay all charges assessed against it until that suit was instituted The statute of 1889 required that a copy of the charter be filed and that

there be paid for a permit to do business a minimum tax of $25.00, based upon $100,000 of capital stock. It provided also for an increase predicated upon capital stock until a maximum fee of $200 was reached.

In 1893 a franchise tax of $10.00 a year was levied on both domestic and foreign corporations. In 1897 this was changed as to domestic corporations, the minimum of $10.00 was retained and the maximum was raised to $50.00. As to foreign corporations the maximum was raised from $10.00 to $25.00 and the maximum limit was removed by fixing a percentage charge upon capital stock. By an act of 1907 "the surplus and undivided profits of the company became susceptible of being taken into view in addition to its authorized capital".

The authorized capital stock of the Crane Company was $17,000,000 paid up and issued. Its surplus and undivided profits was $8,139,000. Business done in Texas amounted to $1,019,750 for the year preceding the suit, divided about equally between State and interstate business, and at that time this company had invested there $301,197.

> "In the same year in which the legislation was enacted providing for the taxation on the basis of surplus and undivided profits for the purpose of the franchise tax there was also enacted a law vastly increasing the amount of the permit tax. (Acts of 1907, S. S., p. 500; Revised Statutes, 1911, Art. 3837.) We say vastly increasing because, although the standard for the levy of that tax, the authorized capital stock, was retained, the maximum limit which was $200 for ten years under the previous law was removed and the percentages of levy on the authorized capital stock were so augmented that the permit for which the company paid to the Secretary of State $200 for ten years in 1905 under the new law would have required the company to pay in order to do business in the State the sum of $17,040."

These taxes were held to be invalid.

This reference was made to the Baltic case in *Cudahy Packing Co.* v. *Hinkle, supra.*

> "*Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, 34 S. Ct. 15, 58 L. Ed. 127, upheld a tax based upon authorized capital stock but limited to $2,000 imposed by Massachusetts upon foreign corporations for the privilege of doing local and domestic business therein. Consideration was given to the fact that the corporate assets were four times the authorized capital and the limitation. Weighing all the circumstances, the court concluded that no direct substantial burden was imposed upon interstate commerce and that property beyond the state was not taxed."

The *Alpha Portland Cement Company* v. *Massachusetts,* 268 U. S. 302, is also cited as sustaining the proposition that any direct tax, however small, which burdens interstate commerce, is invalid. It deals with an annual excise tax on a foreign corporation engaged solely in interstate commerce.

In conclusion the court said:

> "Whether, because reckoned upon authorized and not upon actual capital stock, the challenged legislation fails to require like fees for equal privileges within the doctrine of *Airway Electric Appliance Corp.* v. *Day,* 266 U. S. 71, 45 S. Ct. 12, 69 L. Ed. 169, we need not now consider."

Here under review was not an entrance fee but an annual franchise tax levied against a corporation already admitted and based upon the mere number of authorized shares of no par value stock.

These are all of the cases cited by the court in support of its conclusions.

They tell us that the amount of the tax is immaterial and that a maximum limit is not in itself necessarily the touchstone. To this extent the Baltic case is definitely overruled.

We are told that with the maximum limit out of the way the principles of the Looney case apply in the Cudahy case and govern.

When the General Railway Signal Company case was decided the Looney case had already been argued, re-

argued and decided. Plainly the court did not then look upon them as being in conflict. The General Railway Signal Company case was near the border line but not over it, and to that effect the Looney case was cited. In the Cudahy case Mr. Justice Brandeis, dissenting, said: "The General Railway Signal Company case was decided by a unanimous court and the correctness of the decision has never been questioned." This statement, if unwarranted, would have been met in the court's opinion.

An entrance fee is to be distinguished from charges thereafter made. It may be taken or left. When burdens are afterwards imposed the State in substance says, you must acquiesce or forfeit a built-up business.

In the Looney case the complaining company had been duly admitted, had paid all charges necessitated by admission, had made investments and had built up business. It was after this that additional invalid burdens were placed upon it.

When the Cudahy Company began business in the State of Washington no admission fee appears then to have been necessary or imposed. And it was not until many years later, after it, too, had made investments and built up business, that a "filing fee" and an "annual license fee" was called for.

As indicated, the narrow issue is this: Has the Cudahy case overruled the General Railway Signal Company case and the Western Gas Construction Company case? The issue is too serious to warrant us in believing that the Supreme Court with an opportunity to express itself would have been content to do this by inference only.

We have not undertaken to review the cloud of cases brought to our attention. "They beat down the mind and cloud with dust the vision". The opinion of the Commission alone covers one hundred and forty-seven printed pages.

For reasons stated, we are of opinion that the judgment of the State Corporation Commission should be affirmed, and it is so ordered.

Affirmed.